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293969—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 672

H. B. NELSON CONSTRUCTION COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 18–22) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered June 3, 1940 (R. 22). A motion for a new trial was overruled October 7, 1940 (R. 22–23). The petition for a writ of certiorari was filed on January 4, 1941 (R. 47). The jurisdiction of this Court is invoked under the provisions of Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether the Court of Claims made proper findings of fact.

2. Whether the United States violated any obligation or warranty of the contract.

3. Whether petitioner released his claim for breach of contract.

4. Whether petitioner is entitled to remission of liquidated damages.

STATUTE INVOLVED

Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752 (U. S. C. Supp. V, Title 28, Sec. 288, provides:

> (b) In any case in the Court of Claims, including those begun under section 180 of the Judicial Code, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue.

STATEMENT

On June 19, 1934, for a consideration of $47,816.00 petitioner entered into a contract with United States, acting through the Chief of the Bureau of Yards and Docks of the Navy Department, for the construction of concrete foundations for three 300-foot and six 600-foot radio towers at the Navy Radio Station, Summit, Canal Zone (R. 12).

The work was to be commenced within 10 calendar days after receipt of notice to proceed, and the foundations for the 300-foot towers were to be completed within 45 calendar days and for the 600-foot towers within 75 calendar days thereafter (R. 12). Notice to proceed was received by the petitioner on July 24, 1934, and the date for completion of the 300-foot towers was thereby fixed as September 7, 1934, and for completion of the 600-foot towers as October 7, 1934 (R. 12). The founda-

tions for the 300-foot towers were completed within the prescribed time, and are not involved in the present controversy (R. 12).

SECTION 2–01 of the specifications provided that bids should be based upon the assumption that the surface elevations were as indicated, that rock would not be encountered, and that no artificial obstructions would be encountered (R. 12–13). Paragraph 7 of the general provisions of the specifications stated that the information respecting the site given in the drawings and specifications had been obtained by Government representatives and was believed to be reasonably correct, but that the Government did not warrant either its completeness or accuracy. Intending bidders were invited to examine the site and acquaint themselves with the working conditions (R. 14). Paragraph 7 also stated that such bidders would "be furnished with such additional information as is available by the local Government representatives" (R. 14).

A representative of the contractor, together with a number of other prospective bidders, visited and made an examination of the site of the work (R. 14). The examination was made under the leadership of the Public Works Officer, the party proceeded to the site of each tower, and viewed the existing conditions (R. 14). It had rained the night before and the ground was wet, water standing in depressions (R. 14). High grass six to eight feet tall was growing on all of the sites, and access

thereto for inspection was obtained by cutting a trail through the grass (R. 15). The sites of towers 3, 4, 5, and 6 were on or near marshy land, but the party did not venture upon any marshy land (R. 14–15). There were drainage ditches in the general area in which the towers were to be located, but their effect upon the subsoil was not apparent (R. 15). The contractor based his bid upon the inspection made by its representative and made no application to Government officers for further information (R. 15). Such officers made no representations to the contractor or his representative that the site was otherwise than it appeared to be, nor did they conceal any material facts from either of them (R. 15).

The petitioner thereupon proceeded with the work and encountered certain difficulties and delays in the performance thereof (R. 15–17). This was due to various causes, among which were the wet, marshy condition of the subsoil, the buckling of sheet piling, lack of adequate equipment, miring of equipment, breakdown of equipment, lack of drainage, failure to prosecute the work more vigorously, and delays incident to changes authorized by the Government (R. 16).

There was a delay on the part of the Government in inspecting copper wire for the tower foundations, resulting in delay in placing the foundation of Tower No. 2, for which delay the contracting officer extended the time for completion of the

foundation involved by 10 days (R. 16). The contracting officer authorized the contractor to provide and place 720 1-inch dowels in pile foundations and to make a soil-bearing test on the foundation of footing C of Tower No. 1 (R. 16). For this extra work, the contract was modified in writing and the contract price was increased $470.88 (R. 16). It was also found necessary to use longer piling than that estimated at Towers 3, 5, and 6 (R. 16). On Tower No. 4, petitioner encountered rock in excavating, and he was required to provide a drainage ditch to protect footing C of the foundation for Tower No. 3 (R. 16). The contracting officer in writing increased the contract price by the sum of $4,784.54 for the extra-length piling, the rock excavation and the construction of drainage ditches, and extended the time for performance by 35 days because of these matters (R. 16). For all delays occasioned by the Government, petitioner secured adequate extension of time together with fair and reasonable compensation (R. 17).

The contract price, as modified by the change orders, was $53,071.42. Of that amount, petitioner was paid $49,121.42, the difference ($3,950) being assessed as liquidated damages for the delays in completing the foundations of Towers 3, 4, and 5 (R. 17). On April 12, 1935, petitioner executed a release to the Government of all claims arising under or by virtue of the contract except the right to protest the assessment of liquidated damages

(R. 17). On April 15, 1935, petitioner applied to the contracting officer for remission of liquidated damages. He refused to remit the damages, finding that there was an absence of misrepresentation of conditions at the site and that the conditions encountered did not differ from those reasonably to have been expected (R. 17). On appeal, the Secretary of the Navy sustained the action of the contracting officer (R. 17).

Petitioner thereupon brought suit in the Court of Claims seeking to recover the sum of $26,796.54, which was alleged to represent the difference between the cost of the work plus 10% profit and 1½% for a bond, and the amount actually received. Petitioner there contended that the United States had concealed and misrepresented the working conditions at the site, that the release had been signed under duress, and that liquidated damages had been improperly assessed (R. 1–6).[1]

The Court of Claims dismissed the petition, holding that there had been no misrepresentation by Government officers as to the working conditions to be encountered, and that in any event the petitioner had signed a release of all claims except those for the remission of liquidated damages. In respect of liquidated damages it held that they were properly assessed (R. 18–22). A motion for a new trial was overruled October 7, 1940 (R. 23).

[1] A second cause of action asserted in the petition (R. 6–10) is involved in *H. B. Nelson Construction Company* v. *United States*, No. 673.

ARGUMENT

Petitioner contends that the Government misrepresented and concealed the difficult working conditions under which the contract was to be performed, and so violated or changed certain obligations of the contract as to entitle petitioner to recover. Petitioner has assigned as errors[2] the action of the court below in making certain findings of fact, and its failure to find other facts which he asserts will sustain his contention; and urges that in any event he was improperly charged with liquidated damages for delays. We submit that the decision of the court below, both as to facts and law, was correct.

1. On April 12, 1935, the contractor executed the release under Article 16 (d) of the contract to the Government of "all claims arising under or by virtue of said contract" except "the right to protest the liquidated damages amounting to $3,950.00" (R. 17). The petitioner admits that he executed this release, but contends that he did so under duress, as it was necessary for him to receive his final payment to meet his pay-roll expenses, and that such payment was refused unless he executed the release (Pet. 37).

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[2] The specification of errors to be urged are 49 in number and occupy 10 pages (Pet. pp. 11–20). Under the rule announced in *Local 167* v. *United States*, 291 U. S. 293, 296, this Court might appropriately dismiss the instant petition for failure to comply with Rule 9.

Article 16 (d) of the contract provides that upon completion of the work under the contract, the amount due would be paid after the contractor had furnished the Government with "a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein" (R. 12, 20). The release, therefore, was not obtained by duress; the right to require it prior to final payment was authorized by the terms of the contract. An insistence on a right secured by contract is not duress. Williston on Contracts (Rev. Ed. 1937), sec. 1606. There is nothing in the contract which limited the character or amount of the claims which the contractor could reserve from the operation of the release, nor is there a scintilla of evidence in the record that petitioner in signing the release was compelled to forego any claim which he here urges. He may not, therefore, now assert any claim other than the one for liquidated damages in the amount of $3,950, which he specifically exempted from the operation of the release. Cf. *Hartsville Mill* v. *United States,* 271 U. S. 43.

2. Even assuming, without conceding, that the release did not comprehend the claims here advanced, petitioner's contentions are without substance.

(a) Petitioner contends (Pet. 21, 29) that the Government inferentially represented that the drainage system of the site of the project was adequate, that it omitted to inform petitioner that the site was swampy, and that the misrepresentation and omission each affords a basis for a cause of action for damages under the rule of *United States* v. *Atlantic Dredging Co.*, 253 U. S. 1, and *Christie* v. *United States*, 237 U. S. 234. The court below found, however, that respondent's officers made no representation that the site was otherwise than it appeared to be or concealed any material information (R. 15). And the finding is amply supported by the testimony of Commander Fogg, the Public Works Officer who conducted the inspection and was the responsible officer to whom inquiries should have been addressed (R. 34–43). It may be observed, moreover, that a representative of petitioner visited the site (R. 14) and should have observed that the site was swampy, and by the same token that the drainage system was inadequate. Petitioner emphasizes that the court below failed to find certain evidentiary facts, but there is nothing to show that these alleged facts were not considered by the court below (cf. *United States* v. *Goltra*, Nos. 191, 192, this Term, decided February 3, 1941), and even if they were accepted as true they would not require a contrary ultimate finding on the issue of misrepresentation and concealment.

(b) The contention (Pet. 22) that recovery may be had on a *quantum meruit* basis because many of

the pilings had to be driven to a greater depth than indicated on the specifications is plainly specious. The latent conditions which required these changes were contemplated by Article 4 of the contract (R. 13), and a change order was issued pursuant thereto allowing petitioner adequate extra compensation for the excess cost incurred by reason of the modifications required (R. 16). Moreover, petitioner was, as the evidence discloses, a member of the Board which approved these changes, both as to amounts and to extension of time (R. 35–36).

(c) There was no breach of conditions of the contract by respondent. Petitioner contends (Pet. 28–29) that a culvert, which he states backed up water, flooded the site and made the work more difficult, was an artificial obstruction within the meaning of Section 2–01 of the specifications which provided *inter alia* that bids were to be based upon the assumption that no artificial obstacles would be encountered, and that if encountered adjustment should be made as provided in Article 4 of the contract (R. 12–13). As clearly appears from the context of Section 2–01, the obstructions referred to are such as would be physically encountered in excavating.

3. The only claim of petitioner exempted from the release, and which he may now assert, relates to an improper assessment of liquidated damages. This claim is, we submit, without merit. Article 9 of the contract makes the decision of the contract-

ing officer on questions of delay, when affirmed by the head of the department, final and conclusive on the parties thereto.[3] The contracting officer has found that petitioner was not entitled to remission of liquidated damages, and his decision on appeal was affirmed by the Secretary of the Navy (R. 17). Such finding will not be disturbed by the courts unless the action of the officer concerned was so arbitrary or capricious as to imply bad faith. Cf. *United States* v. *John McShain, Inc.*, 308 U. S. 512, 520. Here, the court below found that the delay in the work was due to inadequate preparation and equipment on the part of the contractor, the wet marshy condition of the subsoil, the buckling of sheet piling, the miring of excavating or pile-driving equipment, lack of drainage, failure to prosecute the work more vigorously, and the changes authorized by the Government and its failure to inspect copper wiring promptly (R. 16). The court further found that for all delays occasioned by the Government there had been given to the contractor adequate extensions of time for performance (R. 17). The evidence supporting these findings of the court consists of testimony of the Public Works Officer, Commander Fogg (R. 34–43), and Leslie C. Davies, an employee of respondent (R. 28–33). We submit that the record discloses no bad faith on the part of the contracting officer and the Secretary

[3] See Plff.'s Ex. 1 on file with the Clerk of this Court.

of the Navy, and that the petitioner accordingly is not entitled to remission of liquidated damages.[4]

CONCLUSION

The decision of the court below is correct. There exists no conflict of decisions and the case does not involve questions of general interest. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

FRANCIS BIDDLE,
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FRANCIS M. SHEA,
Assistant Attorney General.
PAUL A. SWEENEY,
Special Assistant to the Attorney General.

FEBRUARY 1941.

[4] Petitioner contends that Article 9 of the contract specifically exempts him from the assessment of liquidated damages for delays resulting from floods, and that he was entitled to findings disclosing that the site of the work was flooded. But the floods referred to in the proviso to Article 9 must be taken in their context, where they are associated with acts of God, the public enemy, and of the Government, fires, epidemics, etc. (R. 2). It is clear that all of these provisions refer to *force majeur*, which would necessarily preclude the contractor from doing any work on the contract.

U. S. GOVERNMENT PRINTING OFFICE: 1941